Sonny Hill Oldsmobile GMC Truck, Inc. *and* Teamsters Local Union No. 552, affiliated with the International Brotherhood of Teamsters, AFL–CIO and Association of Machinists and Aerospace Workers, AFL–CIO. Case 17–CA–17925

July 5, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon a charge, amended charge and second amended charge filed by Teamsters Local Union No. 552, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Teamsters) and the Association of Machinists and Aerospace Workers, AFL–CIO (the Machinists) (the Unions) on March 21, April 20, and August 29, 1995, the General Counsel of the National Labor Relations Board issued an amended complaint (complaint) on September 5, 1995, against Sonny Hill Oldsmobile GMC Truck, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although the Respondent initially filed an answer to the amended complaint, on May 15, 1996, the Respondent withdrew its answer.

On May 24, 1996, the General Counsel filed a Motion for Summary Judgment with the Board. On May 28, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that although the Respondent initially filed an answer to the amended complaint, the Respondent withdrew that answer on May 15, 1996. Such a withdrawal has the same effect as the failure to file an answer, i.e., the allegations are considered to be admitted.[1] Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business at 3440 Main, Kansas City, Missouri, was engaged in the business of operating a car and truck dealership and a car and truck service and body shop. During the 12-month period ending March 24, 1995, the Respondent, in conducting its business operations, purchased and received at its Kansas City, Missouri facility goods valued in excess of $50,000 directly from points outside the State of Missouri. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Teamsters and the Machinists are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Selected Automobile Dealers of Greater Kansas City Missouri and Kansas and Vicinity (the Association) has been an organization composed of various employers in the business of operating car and truck dealerships, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations including the Teamsters and the Machinists. At all material times, the Respondent has been a member of the Association and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with various labor organizations including the Teamsters and the Machinists. About March 10, 1994, the Teamsters and the Machinists entered into a collective-bargaining agreement with the Association which is effective from February 1, 1994, through January 31, 1997 (the 1994–1997 collective-bargaining agreement).

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees in the service, body and paint, and parts departments, including any full-time garage employees, but excluding office clerical employees, car and truck sales persons, service writers, control tower operators, office clerical employees, professional employees, guards, supervisors as defined in the Act, and part-time employees as defined in Section 7.4 of the 1994–1997 collective-

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

bargaining agreement employed by the Respondent at its facility.

At all material times, the Teamsters and the Machinists have been the designated exclusive collective-bargaining representative of the unit and the Teamsters and the Machinists have been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the 1994–1997 collective-bargaining agreements. At all material times, based on Section 9(a) of the Act, the Teamsters and the Machinists have been the exclusive collective-bargaining representative of the unit.

About March 10, 1995, the Respondent gave employees a written memorandum stating that "Effective 3–20–95 [the Respondent] will cease business as a franchise dealer" and that unit employees would no longer have protection under the established union contract if they chose to remain employed after March 20, 1995.

The Respondent failed to continue in effect all the terms and conditions of the 1994–1997 collective-bargaining agreement by failing to adhere to the terms and conditions of employment provided for in that agreement, including failure to pay pension fund contributions on behalf of its unit employees for February and March 1995. The Respondent engaged in this conduct without the consent of the Teamsters and/or the Machinists. These terms and conditions of employment are mandatory subjects for the purposes of collective bargaining.

By letter dated March 9, 1995, the Teamsters and the Machinists requested that the Respondent meet and bargain regarding the effects upon the unit employees of the closure or sale of the Respondent's business. Since about March 9, 1995, the Respondent failed and refused to meet and bargain with the Teamsters and the Machinists.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act. By unilaterally failing to continue in effect all the terms and conditions of the 1994–1997 collective-bargaining agreement and by failing and refusing to meet and bargain with the Teamsters and the Machinists, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to continue in effect all the terms and conditions of employment of the 1994–1997 collective-bargaining agreement by failing to adhere to the terms and conditions of employment provided for in that agreement, including failing to make contractually required contributions to the pension fund for February and March 1995, we shall order the Respondent to honor the terms of the collective-bargaining agreement, and to make the unit employees whole for any loss of earnings attributable to its failure to do so. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In order to remedy the Respondent's failure to make the contractually required contributions to the pension fund, we shall also order the Respondent to make the unit employees whole by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[2]

As a result of the Respondent's unlawful failure to bargain in good faith with the Unions about the effects of its decision to close or sell its facility, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Unions. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Re-

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

spondent to bargain with the Unions concerning the effects of closing its facility on its employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Unions on those subjects pertaining to the effects of the closing or sale of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Unions' failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Unions; and (4) the Unions' subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Sonny Hill Oldsmobile GMC Truck, Inc., Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they will no longer have protection under the established union contract if they choose to remain employed after March 20, 1995.

(b) Unilaterally failing to adhere to the terms and conditions of employment provided for in the 1994–1997 collective-bargaining agreement, including failing to pay pension fund contributions on behalf of its unit employees.

(c) Failing or refusing to bargain with the Teamsters Local Union No. 552, affiliated with the International Brotherhood of Teamsters, AFL–CIO, and the Association of Machinists and Aerospace Workers, AFL–CIO regarding the effects on unit employees of its decision to close or sell its business.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the terms of the 1994–1997 collective-bargaining agreement, including making pension fund contributions for February and March 1995, and make the employees in the following unit whole, with interest, for any loss of earnings and benefits and for expenses attributable to its failure to adhere to the agreement, in the manner set forth in the remedy section of this decision:

> All employees in the service, body and paint, and parts departments, including any full-time garage employees, but excluding office clerical employees, car and truck sales persons, service writers, control tower operators, office clerical employees, professional employees, guards, supervisors as defined in the Act, and part-time employees as defined in Section 7.4 of the 1994-1997 collective-bargaining agreement employed by the Respondent at its facility.

(b) On request, bargain with the Union with respect to the effects on unit employees of the decision to close or sell its business, reducing to writing any agreement reached as a result of such bargaining, and pay limited backpay to the unit employees in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Kansas City, Missouri, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 21, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 5, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform employees that they will no longer have protection under the established union contract if they choose to remain employed after March 20, 1995.

WE WILL NOT unilaterally fail to adhere to the terms and conditions of employment provided for in the collective-bargaining agreement, effective from February 1, 1994, through January 31, 1997, including failing to pay pension fund contributions on behalf of our unit employees.

WE WILL NOT fail or refuse to bargain with the Teamsters Local Union No. 552, affiliated with the International Brotherhood of Teamsters, AFL–CIO, and the Association of Machinists and Aerospace Workers, AFL–CIO regarding the effects on our unit employees of our decision to close or sell our business.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor the terms of the 1994–1997 collective-bargaining agreement, including making pension fund contributions for February and March 1995, and make our employees in the following unit whole, with interest, for any loss of earnings and benefits and for expenses attributable to our failure to adhere to the agreement.

> All employees in the service, body and paint, and parts departments, including any full-time garage employees, but excluding office clerical employees, car and truck sales persons, service writers, control tower operators, office clerical employees, professional employees, guards, supervisors as defined in the Act, and part-time employees as defined in Section 7.4 of the 1994–1997 collective-bargaining agreement employed by us at our facility.

WE WILL, on request, bargain with the Union with respect to the effects on unit employees of our decision to close or sell our business, reducing to writing any agreement reached as a result of such bargaining, and pay limited backpay to our unit employees.

SONNY HILL OLDSMOBILE GMC TRUCK, INC.